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August 29, 1991

Margaret Silver  
Air & Toxics Branch Chief  
Regional Counsel's Office, Region X  
Environmental Protection Agency  
1200 Sixth Avenue  
Seattle, WA 98101

**Re: General Electric Spokane  
CERCLA State Lead National Priorities List Site**

Dear Meg:

As you know, Perkins Coie is local counsel for General Electric ("GE") for matters pertaining to the GE Spokane Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA") National Priorities List ("NPL") site (the "Site"). In addition to discussing Site matters with you and William Hedgebeth, we have held discussions during the past several weeks with representatives of the Washington State Department of Ecology ("Ecology"), the Office of the Attorney General of the State of Washington and Robert Kievit, of EPA's Region X Washington Operations Office. GE supports a coordinated regulatory effort in overseeing the Site activities. Accordingly, we encourage you to disseminate this letter and the accompanying technical information as you deem appropriate.

At Mr. Hedgebeth and your request, we are sending this letter first, to provide additional information on the technical progress at the Site and second, to describe the legal framework governing the remediation activities. This letter also responds to the May 31, 1991 letter from Kenneth D. Feigner, Chief Pesticides and Toxic Substances Branch of Region X, to Dr. Deborah Hankins of GE. I understand that you have been supplied with that letter and generally briefed on the issues. This letter will confirm in writing the various bases upon which EPA Region X can rely for determining that at the Site a TSCA enforcement action is not appropriate or that, in the alternative, Region X should exercise its discretion and decline to take an enforcement action pursuant to certain regulatory requirements of TSCA, specifically 40 C.F.R. § 761.65(a) and 40 C.F.R. § 716.218.

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The Site became an official CERCLA site almost exactly two years ago. In September 1989, EPA listed the Site on the CERCLA "NPL". In October 1989, under the Superfund/Hazardous Waste Cleanup Memorandum of Agreement ("SMOA"), EPA and Ecology designated the Site as an "Ecology lead" Superfund site. In light of the Site's Ecology lead status, before undertaking any discussions with Region X, we discussed the TSCA issues with both the Attorney General's office of the State of Washington, specifically Jerry Ackerman, and with the Ecology-designated project manager for this Site, Guy Gregory of Ecology's Eastern Regional Office. Mr. Gregory specifically approved our communications with Region X. We initiated those communications first through the Region X Washington Operations office, specifically, Robert Kievit, who in turn referred us to Mr. Hedgebeth and to you.

GE and its contractor, Bechtel, have been cooperating fully with Region X and with Ecology. In compliance with CERCLA and the State Model Toxics Control Act, GE has been performing a Remedial Investigation and Feasibility Study ("RI/FS") for the Site. As you may know, RI/FS activities, including any treatability study performed as part of an RI/FS, are "response actions" within the meaning of CERCLA. Currently, the RI/FS activities are proceeding under Agreed Order No. DE 90-05 between GE and Ecology. See copy of the Agreed Order, attached. According to Section C of the Agreed Order, GE is required to include, as part of the Phase 1 feasibility study ("FS") for the Site, a "demonstration of in-situ vitrification as called for by the Geosafe Corporation TSCA permit application and TSA demonstration test plan . . . ." Agreed Order, p. 9. Although, according to Section 121 of CERCLA, no federal, state or local permit is required for any response action occurring on-site, Geosafe had submitted a permit application and test plan to EPA's Office of Toxic Substances before GE entered into the Agreed Order. Throughout the conduct of the RI/FS activities, and in particular, during the conduct of ISV demonstration activities, GE has maintained close communications with the EPA headquarters TSCA permit writer, Mr. Dodahara, as well as Region X TSCA program personnel.

The ISV demonstration (RI/FS treatability study) will involve virtifying five melt cells, each measuring twenty-six feet square on the surface and nineteen feet deep, including a two-foot thick cover of clean sand. Each cell contains PCB-containing soils from the site and one or more of the

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following: PCB spiked soil layers, concrete and asphalt debris or drummed soil cuttings. As part of the demonstration, GE excavated and placed approximately 3,500 tons of soil in the five test cells. To obtain soils with elevations of PCBs sufficient to perform the demonstration, GE was required to secure approximately 1,103 pounds of PCB liquid from an off-site location. The liquid PCBs were brought to the Site on October 26, 1990 (see Manifest Document number 90113). In test cell number two, the 1,103 pounds of liquid PCBs was mixed with 76,948 pounds of clean sand and the mixture was placed in three sixteen-inch deep layers (spiked layers).

Around the perimeter of the five test cells, GE installed a vertical barrier by placing sections of eight-inch thick precast concrete panels to structurally separate the outer barrier material (cobble) from the PCB-containing cell material. The precast panels were vertically interlocked prior to filling the cells with PCB-containing soil and debris. The purpose of the cobble wall is to provide a thermal boundary for the melt front. Sand bags were used to construct a two-foot wide perimeter wall outside the cobble wall. The sand in bags forms a clean exterior wall which was sampled prior to, and will be sampled after, the ISV demonstration. See photographs provided with this letter.

It is well-known that Geosafe recently has incurred technical difficulties in connection with the performance of the ISV technology. EPA Region X is familiar with the details of the status of difficulties and we will not belabor those details here. Technical delays are not uncommon when utilizing innovative technologies. Notwithstanding the potential for future technical delays, GE, Bechtel and Geosafe continue to conclude that ISV technology is a strong candidate for use at the Site. Furthermore, recent discussions with Mr. Dodahara indicate that Geosafe could submit revisions to the current test plan and a revised schedule for ISV demonstration without having to refile the application for test approval. EPA headquarters review would take approximately one month.

GE has invested enormous time and dollar resources in support of the Site's ISV demonstration. GE commenced its technical investigation of ISV in 1985 and to date, has incurred over \$1 million in costs associated with the ISV demonstration at this Site alone. GE has been willing to

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commit to such a resource intensive effort because it believes the Site could become a unique national example of the use of ISV technology for environmental remediation at PCB sites. GE expects to proceed under existing contractual relationships to arrange for the ISV demonstration.

As Mr. Feigner correctly stated in his May 31, 1991 letter, pursuant to 40 C.F.R. § 761.65, any "PCB Article or PCB Container stored for disposal after January 1, 1983, shall be removed from storage and disposed of as required by subpart D of this part within one year from the date when it was first placed into storage." While issues remain whether PCB Articles or PCB Containers have been "placed into storage" or "stored for disposal" at the Site, for purposes of this letter we will assume that those events have taken place. There are numerous grounds on which the requirements of 40 C.F.R. § 761.65(a) are not applicable to the Site.

It is fundamentally important to recognize that the Site is a CERCLA "NPL" site, with remedial activities proceeding under CERCLA and the National Oil and Hazardous Substances Pollution Contingency Plan ("NCP"). In promulgating the current NCP, EPA expressed the controlling effect of CERCLA as follows:

EPA's interpretation that CERCLA response actions are required to meet state (and other federal) environmental law standards only to the limited degree set out in CERCLA is also necessary to comply with the special mandates in CERCLA to respond quickly to emergencies, and to perform Fund-balancing. The position that on-site CERCLA response actions are not independently subject to other federal or state environmental laws is a long-standing one, based on a theory of implied repeal or preemption. See e.g., 50 FR. 47912, 47917-18 (Nov. 20, 1985); 50 FR. 5862, 5865 (Feb. 12, 1985); "CERCLA Compliance With Other Environmental Laws" Opinion Memorandum, Francis S. Blake, General Counsel, to Lee M. Thomas, Administrator, November 22, 1985

55 Fed. Reg. 8742 (March 8, 1990) (emphasis supplied).

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Although CERCLA response actions are not independently subject to other federal or state laws, CERCLA and the NCP require compliance with the substantive requirements of other federal and more stringent state laws. These requirements are referred to as applicable or relevant and appropriate requirements, or "ARARs," under section 121 of CERCLA. EPA consistently has maintained that actions taken on Superfund sites need not comply with the administrative or procedural requirements of other federal or state laws. See, e.g., 55 Fed. Reg. 8756 (March 8, 1990); 53 Fed. Reg. 51443 (Dec. 21, 1988); CERCLA Compliance With Other Laws Manual, EPA/OSWER Directive No. 9234.1-01 at p. 1-11 (Interim Final Guidance, Aug. 8, 1988).

In addition to limiting the scope of the applicability of other laws on CERCLA sites, CERCLA and the NCP establish varying standards of compliance with ARARs, depending if the point of compliance is during the RI/FS or upon completion of the remedial action. CERCLA requires any remedial action selected to attain ARARs upon completion of the remedial action. The NCP broadened the ARAR compliance requirement to reach RI/FS activities, but in doing so, lessened the standard for compliance with ARARs during an RI/FS. The NCP requires all activities undertaken during an RI/FS to comply with ARARs "to the extent practicable, considering the exigencies of the circumstances." 55 Fed. Reg. 8756 (March 8, 1990).

The PCBs were brought to the Site as part of a CERCLA lead agency-required treatability study to be performed as part of the Site RI/FS. See Agreed Order. Accordingly, the standard for compliance with TSCA (and any other ARAR) during the conduct of the ISV treatability study is to the extent practicable, considering the exigencies of the circumstances.

In his letter, Mr. Feigner asserts the potential for violation of the TSCA one-year PCB storage requirement. We believe that the time limitations of other laws are not generally substantive and thus not potentially ARAR at a Superfund site. Furthermore, such time limitations are not appropriate in any event at this site. This position is consistent with CERCLA's need to maintain control of the timing of response activities at a CERCLA site. If the time requirements of other environmental laws were considered substantive and thus ARAR, the Superfund Program would lose control of its ability to schedule response actions in an environmentally sound and comprehensive manner. In addition,

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the NCP contains procedures that CERCLA actions must follow. Time requirements of other laws would jeopardize compliance with the NCP's complex procedural scheme. In this instance, the ISV demonstration is part of an RI/FS which is proceeding under a state (CERCLA lead agency) Agreed Order. All activities at the Site are being closely supervised by regulatory authorities and experienced contractors. The TSCA one-year requirement, therefore, should be considered procedural or administrative. See generally, 53 Fed. Reg. 51443 (Dec. 21, 1988). Similarly, the Certificate of Disposal requirement of 40 C.F.R. section 761.218 is an administrative requirement and not a potential ARAR on a Superfund site.

Even if the one year requirement were considered substantive, according to the NCP the standard of compliance is to the extent practicable, considering the exigencies of the circumstances. The technical difficulties experienced at the site (*i.e.*, "exigencies of the circumstances"), have necessitated the delay in the destruction of the PCBs. It would clearly not be practicable to remove all the PCB contaminated soil and incinerate it off-site at a cost of approximately \$13.5 million. We submit, therefore, GE has complied with the one year disposal requirement to the extent required by law.

Should EPA determine that the one year requirement is ARAR and further determine GE has not met its burden of compliance, an ARAR waiver is justified in this circumstance. EPA guidance expressly anticipates that, notwithstanding the TSCA one-year regulation, PCB-contaminated material may be generated during the RI/FS that will require storage that may exceed the one-year limitation. That guidance states as follows:

Where the final disposition of the waste will be specified in the ROD, the exceedence of the TSCA storage limitation may be justified using a CERCLA waiver. An interim remedy waiver under CERCLA could be invoked. Since the removal action is interim in nature and the remedy determined in the ROD will comply with ARARs for final disposition of the waste, a waiver of the ARARs is justified. A memorandum supporting the action should be prepared and placed in the administrative record to document the finding.

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Guidance on Remedial Actions for Superfund Sites with PCB Contamination (Aug. 1980) at 18 (emphasis supplied). We have attached a copy of the relevant guidance page. While GE does not concede that the one-year requirement is an ARAR, this guidance clearly establishes that, even if it were considered an ARAR, it should be waived in this instance. If Region X prefers to approach this Site in a CERCLA waiver context, please consider this letter a request for such a waiver. CERCLA § 121(d)(4)(A).

Finally, GE submits that in any event EPA should exercise its enforcement discretion and decline to take an enforcement action in this instance. Activities necessary to support a CERCLA treatability study required by a state order do not present an appropriate situation for a TSCA enforcement action. GE is acting cooperatively under CERCLA mandates being enforced by a state agency pursuant to its authorities and pursuant to Region X's memorandum of agreement with the state. Also, GE voluntarily has coordinated its actions with EPA Region X CERCLA and EPA headquarters TSCA program personnel. Consistent with the NCP's remedy selection expectation encouraging the use of innovative technologies, GE is aggressively pursuing the use of innovative technology at this Site. The importation of PCBs to the Site was necessary to demonstrate the innovative technology. Such efforts should not be discouraged. Even if the one-year requirements and the Certificate of Disposal requirements were applicable or relevant and appropriate in this instance, they should not be enforced under an independent enforcement action because GE is proceeding with EPA and the state under CERCLA authorities which take precedence.

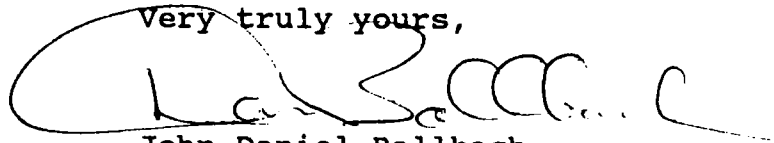
The TSCA requirements must be considered in the context of the CERCLA requirements. CERCLA, under Ecology's lead, has ensured that the Site presents no threat to human health or the environment. The site is secured, stabilized and protected. The PCB contaminated soil is covered with two feet of clean soil and is lined with eight-inch thick concrete walls backed by two feet of cobble and two feet of clean sand. The attached photos and test cell configuration information in this letter demonstrate that the TSCA storage requirements are satisfied to the extent they are an ARAR or are clearly entitled to the equivalency waiver provision of CERCLA § 121(d)(4)(D) or the interim action waiver of CERCLA §121(d)(4)(A).

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Although this letter has not provided an exhaustive discussion of the rationales counseling against a TSCA enforcement action, it hopefully has provided enough information to facilitate your discussions with Region X CERCLA and TSCA and Ecology personnel. GE gladly would meet with all appropriate persons promptly to resolve any outstanding issues. Based upon our discussions with Region X, we understand Region X desires the ISV tests go forward and is planning no enforcement action until a review of the various state and federal issues has been completed.

We appreciate your assistance with these issues.

Very truly yours,



John Daniel Ballbach

JDB:cms

cc: William Hedgebeth, EPA Region X  
Robert E. Keivit, EPA Region X  
Hiroshi Dodahara, EPA Headquarters/TS798  
Carol L. Fleskes, Department of Ecology  
Guy Gregory, Department of Ecology  
Jerry Ackerman, Attorney General's Office, State of Washington

Enclosures:      1.    Agreed Order  
                     2.    Photographs  
                     3.    EPA Guidance pages